# In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1110

ROBERT B. ROBERTS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On direct appeal of petitioner's 1962 conviction in the Southern District of Florida for securities and mail fraud offenses, this Court vacated the sentence and remanded the case to the district court for an evidentiary hearing as to whether his conviction was tainted by illegal electronic surveillance of conversations between a co-defendant and the co-defendant's attorney. 389 U.S. 18. The district court held a hearing, found no taint, and reinstated the conviction. The court of appeals affirmed (Pet. App. A).

At the hearing, petitioner was not present, but was represented by an attorney. When queried as to his

client's absence, the attorney responded that he considered petitioner's presence "not required" (Pet. 8). In the course of the hearing, the attorney stated that he was relying solely on a violation of the Sixth Amendment right to counsel and was not asserting a violation of petitioner's Fourth or Fifth Amendment rights. Petitioner contends that he had a right to be present at the post-trial hearing to determine taint and that his attorney could not "waive" his rights under the Fourth and Fifth Amendments (Pet. 9).

There is no need to reach these questions. The principal basis of the court of appeals' decision was that petitioner lacked standing, under *Alderman* v. *United States*, 394 U.S. 165, to challenge monitoring of his co-defendant's conversations since he did not take part in them and they did not occur on his premises (Pet. App. A 4–5). This ruling was clearly correct. The court below also properly held, alternatively, that the right to be present at all critical stages of a trial does not extend to a post-trial hearing to determine taint. As the opinion points out, the federal courts have uniformly held that the absence of the defendant at this type of hearing does not substantially impair the opportunity to defend and thus does not violate the Sixth Amendment[1] or Rule 43, F.R. Crim. P. Counsel's decision that reliance on the Fourth and Fifth Amendments would be fruitless was a tactical one, which it

[1] See *Stein* v. *United States*, 313 F. 2d 518, 522 (C.A. 9), certiorari denied, 373 U.S. 918; *Yates* v. *United States*, 418 F. 2d 1228 (C.A. 6); cf. *United States* v. *Lewis*, 420 F. 2d 686 (C.A. 5).

was proper for him to make, and not a "waiver" of petitioner's rights. In any event, the court of appeals properly determined that, in this case, any error on these issues was harmless beyond a reasonable doubt. Pet. App. 8; see also *Johnson* v. *United States*, 318 U.S. 189, 201–202.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

JANUARY 1971.

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